

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1338

To be argued by
MICHAEL YOUNG

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B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

ALVIN BURGESS,

Appellant.

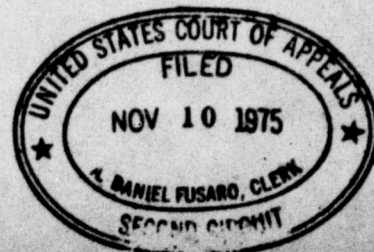
Docket No. 75-1338

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
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ALVIN BURGESS
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MICHAEL YOUNG,
Of Counsel.



PAGINATION AS IN ORIGINAL COPY

INDEX

ATTORNEYS

For U. S.: APPLEBY

ALVIN BURGESS

For Defendant:

DATE	PROCEEDINGS
5/13/75	Before COSTANTINO, J.- Indictment filed
5-22-75	Before JUDD, J - case called - deft & counsel E. Kelly of Legal Aid present - deft arraigned and enters a plea of not guilty - bail set at \$10,000 PRB - adjd to June 12, 1975 @ 2:00 PM for status report.
6/12/75	Before JUDD, J.- Case called- Deft and counsel present-case adjd to 7/14/75 at 10:00 A.M. for trial
6/4/75	Before JUDD, J.- Case called- marked ready and passed to 7/15/75
6/15/75	Before JUDD, J.- Case called- adjd to 7/16/65 at 11:00 A.M. for trial
7/16/75	Before JUDD, J.- Case called- Deft and counsel present- Trial ordered and begun-jurors selected and sworn-trial contd to 7/17/75 at 10:00 A.M.
7/17/75	Before JUDD, J.- Case called- Deft and counsel present-Trial resumed-Govt rests-deft's motion to dismiss argued-denied-trial contd to 7/18/75 at

75 CR 388

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
	A.M.		
7-18-75	Before JUDD, J - case called - deft & counsel Joanna Seybert of Legal Aid present - trial resumed - deft rests - Govt opens on rebuttal - Both sides rest - defts motion to dismiss argued and denied - deft sums up - Govt sums up - Judge charges Jury - Marshals sworn - alternates discharged - trial contd to July 21, 1975 at 10:00 am		
7/21/75	Before JUDD, J.- Case called- Deft and counsel present- Trial resumed- Jury resumes deliberations- Jury returns and renders a verdict of guilty as charged-Jury dishcharged-Trial concluded-Bail conditions contd-case ad case adjd without date for sentencing		
7/21/75	Stenographers Transcript dated 7/16/75, 7/17/75 and 7/18/75 filed		
7-28-75	Voucher for Expert Services filed.		
7-30-75	Stenographers transcript filed dated July 21, 1975		
9/19/75	Before JUDD, J.- Case called- Deft and counsel present-Deft sentenced to imprisonment for 3 years- execution of sentence stayed pending appeal		
9/19/75	Judgment and Commitment filed- certified copies to Marshal		
9/19/75	Notice of appeal without fee filed		
9/19/75	Docket entries and duplicate of notice of appeal mailed to court of appeal		
9-29-75	Order received from the Court of Appeals that Index to Record be docketed on or Oct. 10, 1975.		

A TRUE COPY
 10/8/75
 BY [Signature]

RJD:RA:1jl
F. #751,168

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

MAY 13 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME AM.....
PM.....

----- X -----
UNITED STATES OF AMERICA

- against -

Cr. No. _____
(T. 18, U.S.C., §659)

ALVIN BURGESS,

Defendant.
----- X -----

75CR.388

THE GRAND JURY CHARGES:

On or about the 18th day of November 1974, within the Eastern District of New York, the defendant ALVIN BURGESS, with intent to convert to his own use, did wilfully and knowingly embezzle, steal and unlawfully take from a motor truck oil burners and oil burner parts of a value in excess of One Hundred Dollars (\$100.00), which were moving as and constituted a part of an interstate shipment of freight from Elyria, Ohio to Patchogue, New York. (Title 18, United States Code, Section 659).

A TRUE BILL.

Parvian Willis
FOREMAN

David G. Tracer
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

1
2 I will describe first the general principles
3 that apply in all criminal trials, then the nature of
4 the charges in this case and the specific rules of
5 law that apply to these charges; some ideas on how
6 to evaluate evidence, and finally something about
7 reaching a verdict.

8 It is your duty as jurors to follow the law
9 as I state it and apply those rules of law to the
10 facts as you find them from the evidence in the case.

11 You are the sole judges of the facts. What
12 counsel has said in argument is not evidence, nor any
13 facts which are set forth in the summations nor in
14 my instructions; if they are different from your
15 recollection, your recollection governs. If my
16 statement of the law is different from what you think
17 it ought to be, you still have to follow the law as
18 I spell it out.

19 You are to perform your duties as jurors with-
20 out bias or prejudice for or against any party.
21 The law does not permit jurors to be governed by
22 sympathy, or prejudice, or public opinion.

23 The law presumes a defendant to be innocent
24 of crime, so the law permits nothing but legal
25 evidence presented before a jury to be considered in

1
2 support of any charge.

3 The presumption of innocence which has been
4 mentioned is enough to acquit a defendant unless the
5 jurors are satisfied beyond a reasonable doubt of
6 the defendant's guilt from all the evidence in the
7 case. A reasonable doubt is a doubt based upon
8 reason and common sense, arising from the state of
9 the evidence or from the absence of evidence.
10 A reasonable doubt doesn't mean a doubt that a juror
11 asserts arbitrarily in order to avoid performing an
12 unpleasant task; it doesn't mean beyond a possible
13 doubt. It is rarely possible to prove anything to an
14 absolute certainty and the law doesn't require this.

15 A definition of proof beyond a reasonable doubt
16 which is frequently used is that it refers to such a
17 doubt as would make you hesitate to act in your own
18 important affairs -- this is an important affair for
19 the defendant.

20 The rule of proof beyond a reasonable doubt
21 operates on the whole case. It does not mean that each
22 bit of evidence must be proved beyond a reasonable
23 doubt. It means that unless the sum total of the
24 evidence satisfies you beyond a reasonable doubt as to
25 each element of the crime charged, you must acquit,

1
2 but if you have no reasonable doubt, you must convict.

3 An indictment, as you have been told, is just
4 a formal method of accusing somebody of a crime. It
5 is not evidence of any kind against the accused, it
6 doesn't create any inference of guilt of any sort.

7 The defendant has pleaded not guilty and the
8 indictment and the not guilty plea create the issue
9 that you are to decide.

10 The law never imposes a duty on a defendant in
11 a criminal case to produce any evidence. He has no
12 obligation to testify, but if he does testify his
13 credibility is to be judged just like the credibility
14 of other witnesses and you can consider the motive
15 that he has and the incentive he may have to tell a
16 story that isn't true to help his case.

17 When you analyze the evidence, you can draw
18 reasonable inferences based on your own common sense
19 and general experience from any facts that you find were
20 proved, but you cannot guess and you cannot speculate.

21 Now for the charges in this case:

22 The indictment is a short one, it says:

23 The grand jury charges that on or about the
24 18th day of November, 1974, within the Eastern District
25 of New York -- which is all of Brooklyn and Queens and

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2 Long Island and Staten Island -- the defendant,
3 Alvin Burgess, with intent to convert to his own use
4 did willfully and knowingly embezzle, steal and un-
5 lawfully take from a motor truck oil burners and oil
6 burner parts of a value in excess of \$100 which were
7 moving and constituting a part of an interstate ship-
8 ment of freight from Elyria, Ohio, to Patchogue,
9 New York.

10 The indictment is based on Section 659 of Title
11 18 of the United States Code, which says:

12 "Whoever embezzles, steals or unlawfully takes
13 from any motor truck or other vehicle with intent to
14 convert to his own use any goods or chattels moving as
15 an interstate or foreign shipment shall be fined or
16 imprisoned," and I won't go into the amount or the
17 penalty of imprisonment because that is for the Court
18 to determine on the basis of a further hearing, if
19 there is a determination of guilt.

20 In order to find the defendant guilty, there are
21 three elements that the Government has to prove beyond
22 a reasonable doubt -- four elements really:

23 First, that the goods were in fact stolen.

24 The statute says, "With intent to convert to
25 his own use," and if he turned them over to

1
2 somebody else or had somebody else take them and to
3 whom they did not belong, that would satisfy the
4 definition of "stolen."

5 The second element, that the goods were at the
6 time a part of an interstate shipment, which is I
7 think what Mrs. Seybert said, is not disputed in
8 this case.

9 The third is that they were taken from a motor
10 truck or other vehicle, which is a fact if you believe
11 the evidence here;

12 And the fourth, that they were worth more than
13 \$100 because the taking of less than \$100 is a lesser
14 offense, it would not be a felony.

15 All of these elements have to be proved beyond
16 a reasonable doubt. You can't infer the existence of
17 one element of the crime from the proof of another
18 element. If all the elements of the indictment are
19 proved beyond a reasonable doubt, then you should
20 convict the defendant.

21 In this case there is no direct evidence that
22 Mr. Burgess stole the goods, but there is circumstantial
23 evidence from which you can infer that fact, and it is
24 for you to determine what the proper inference is.

25 Circumstantial evidence is proof of a chain of

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2 facts and circumstances indicating the guilt or
3 innocence of a defendant. Circumstantial evidence is
4 enough to support a conviction if you find that the
5 defendant is guilty beyond a reasonable doubt on the
6 whole case.

7 You should consider inferences that are con-
8 sistent with innocence as well as inferences that point
9 to guilt. You have to consider the whole case,
10 including inferences consistent with your common
11 sense and leave out anything that is just guess work
12 and determine whether you are persuaded beyond a
13 reasonable doubt that the defendant did in fact take
14 these goods or aided somebody else in taking them.

15 When you determine the credibility of witnesses,
16 you can consider the bias of the witness, his interest
17 in the outcome of the case; you consider his manner
18 while testifying, his candor and his intelligence as
19 you have observed it.

20 You don't have to believe everything that comes
21 from the witness stand, you are to determine how much
22 of it is true.

23 You can consider properly the extent to which
24 any testimony has been corroborated or contradicted;
25 whether there are inconsistencies within the statement

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2 or testimony of any witness, whether any witness has
3 changed his testimony. If there are such inconsistencies
4 or changes, you can decide whether you are going to
5 disregard all the testimony of the witness as you may
6 if you say, I can't believe it. You can determine what
7 part is true or you can say that he may have been
8 mistaken with respect to a part of his testimony and
9 accurate with respect to other parts, and you may
10 accept some and throw out others.

11 You consider how important the details are,
12 what the circumstances were in which the original
13 statement was made and whether the statement which is
14 made on the witness stand is true, regardless of
15 earlier statements. Whether you are going to believe
16 it is within your power as judges of credibility.

17 In dealing with the defendant's testimony, you
18 can consider his relatively poor education and his
19 background and decide whether that persuades you that
20 he was telling you the best he knew or that he was
21 making up a story that is not consistent with the truth.

22 There are a few special rules that might be
23 considered here:

24 The defendant was not where he was expected to
25 be the next morning. Intentional flight or concealment

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2 of a defendant immediately after the commission of a
3 crime is not in itself sufficient to establish guilt,
4 but it is a fact which if proved may be considered by
5 the jury in the light of all of the other evidence in
6 the case in determining guilt or innocence. Whether it
7 shows consciousness of guilt or that there is a
8 significance to be attached to it is the province of
9 the jury. You should consider there may be reasons for
10 running away which are fully consistent with innocence,
11 these might include fear of being arrested, unwillingness
12 to confront the police, reluctance to appear as a
13 witness or fright. A feeling of guilt does not necessarily
14 reflect actual guilt.

15 The jury should also bear in mind that the law
16 never imposes upon a defendant in a criminal case the
17 burden of calling any witnesses or producing any
18 evidence. It is also the law that anybody who knows of
19 the actual commission of a felony that is punishable
20 in the Courts of the United States and doesn't make the
21 facts known as soon as possible to some judge or other
22 person in authority within the United States is violating
23 the law. Certainly Mr. Burgess is not on trial for
24 such a violation, but you can consider whether his
25 failure to report it was because of fear or ignorance

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2 or whether it was because he would have been reporting
3 something of which he was guilty or likely to be
4 suspected of being guilty.

5 There was reference in Agent Garber's testimony
6 as to two or three women who were described as girl
7 friends or commonlaw wives of Mr. Burgess. There is
8 no evidence that he had any commonlaw wives other than
9 Miss Banks, whom he mentioned, and who was in the
10 courtroom, and I have permitted that testimony to show
11 the efforts that were made to find Mr. Burgess. But
12 you should not consider that fact as affecting his
13 character or creating any inference of guilt, nor should
14 there be any prejudice against him because he is living
15 with a woman to whom he is not legally married. A
16 commonlaw wife is something that we hear quite fre-
17 quently about in our courtroom.

18 The question for you is simply whether this
19 defendant did or did not take the oil burner parts
20 that he signed for in the morning and took out on a
21 truck but which when he brought it in that afternoon
22 were not on the truck.

23 There is another rule about false exculpatory
24 statements that I might make mention of:

25 When a defendant voluntarily and intentionally

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2 offers an explanation or makes some statement tending
3 to show his innocence, and this explanation or statement
4 is later shown to be false, the jury may consider
5 whether this circumstantial evidence points to
6 consciousness of guilt. Ordinarily it is reasonable
7 to infer that an innocent person does not usually
8 find it necessary to invent an explanation or statement
9 tending to establish his innocence. Inferences as to a
10 defendant's explanation pointing to consciousness of
11 guilt and the significance to be attached to any such
12 evidence are matters exclusively within the province of
13 the jury.

14 You can consider in dealing with the testimony
15 that Mr. Burgess at the end of the day said that the
16 oil burners had never been loaded on his truck, which
17 would be an explanatory statement, but it turned out
18 to be not true, that is if you believe Mr. Martin or
19 Mr. Jackson that he made that statement. I think he
20 denied making the statement.

21 There has been reference to Mr. Burgess's prior
22 conviction of possession of a stolen automobile:

23 Such evidence is admissible but not for pur-
24 poses of showing bad character. It is admissible as
25 bearing on the intent or motive or anything else but

1
2 not bad character because he has already been
3 sentenced and you cannot punish him for that. The
4 question is whether he did in fact steal the goods
5 that were given to him in the morning.

6 Now a few things about reaching a verdict:

7 When you retire to the jury room, Mr. Chestang
8 will act as your foreman and preside over your
9 deliberations. He should try to see to it that
10 everybody gets a chance to talk, that only one person
11 talks at a time, and that you pick out a reasonable
12 time at which to cast the ballot. Normally, you
13 should not take any vote until you have had a chance
14 to consider things thoroughly enough so that people
15 are sure what they think, relatively sure. The
16 purpose of deliberation is to let you hear what other
17 people say and what other members of the jury may
18 think. Nobody has to give up an opinion that he
19 honestly believes in as to guilt or not guilty, but
20 you should listen carefully to what other people say
21 and see whether your original impression may yield to
22 ideas or arguments of other members of the jury.

23 When you are considering guilt or innocence,
24 don't give any consideration to the matter of punish-
25 ment, that is a question that is exclusively within

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2 the province of the judge if the defendant is found
3 guilty.

4 If there is any question in your mind about some
5 testimony, at least yesterday's testimony has been
6 transcribed, we can read some of it to you; if need be
7 we will get the reporter in who took the other
8 testimony and have that read to you.

9 If you want to look at any of the exhibits,
10 you can send in a note and they will be made available
11 to you.

12 There will be a marshall outside the jury room
13 door to take any notes that the foreman wants to send,
14 and when you have reached a verdict you will just give
15 him the note saying you have reached a verdict. You
16 don't tell him what it is.

17 You will be called in and the foreman will be
18 asked to announce it when you get in the courtroom and
19 then the clerk will poll the jury and ask every member
20 of the jury if that is in fact their verdict so that
21 we know that it is a unanimous verdict.

22 This is not an early time to submit this to you,
23 and it is a Friday afternoon. But it has been a
24 fairly short case. I hope you will be able to decide
25 it, if you can do so, by staying until 5 or 5:30,

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2 that is permissible. If you haven't reached a
3 verdict and you want to adjourn over the weekend,
4 you can request permission. In that event, I will
5 excuse the two alternates and then I will have to
6 count on all 12 being here on Monday. You have been
7 faithful on the second day.

8 I will give counsel on both sides an opportunity
9 to point out whether I have made any omissions or
10 misstatements in my charge, and I may call you back
11 again, but I am assuming that this is my final word
12 to you until I hear something from Mrs. Seybert or
13 Mr. Appleby.

14 Let me remind you that your oath sums up your
15 duty, and that is without fear or favor to any man
16 you will well and truly try the issues between these
17 parties according to the evidence given to you in
18 Court and the laws of these United States.

19 The next step is for the clerk to swear the
20 marshals.

21 (At this point, the two marshals were sworn.)

22 THE COURT: All right, Mr. Berkowitz and Mrs.
23 Bennett, you can go in and get your belongings that
24 you have in the jury room and then leave directly,
25 but don't talk to the jurors at all.

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The rest of the jurors can go into the jury room.

(At 3:35 p.m. the jury left the courtroom to
begin its deliberations.)

CERTIFICATE OF SERVICE

11/10 , 1975

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Michael A. U-